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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JARMON SANFORD, Defendant and Appellant.	B210890 (Los Angeles County Super. Ct. No. GA069222)

APPEAL from a judgment of the Superior Court of Los Angeles County. David S. Milton, Judge. Affirmed in part, reversed in part, and remanded with directions.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Jarmon Sanford (appellant) of two counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1] (counts 1 & 5) and four counts of assault with a semiautomatic firearm (§ 245, subd. (b)) (counts 2, 3, 4 & 6). In counts 1 and 5, the jury found that appellant discharged a firearm causing great bodily injury and discharged a firearm, respectively (§ 12022.53, subds. (b), (c), (d) & (e)(1)). In counts 1 and 2, the jury found that appellant inflicted great bodily injury (§ 12022.7, subd. (a)). With respect to all counts, the jury found that the crimes were committed to benefit a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).

The trial court sentenced appellant to a total term of 89 years to life. In count 1, the trial court imposed 15 years to life for the attempted murder along with a gun-use enhancement of 25 years to life, for a total term of 40 years in that count. For the assault convictions in counts 3 and 4, the court imposed one-third the midterm (two years) and a 10-year gang enhancement, for a total term of 12 years in each of those counts. In count 5, the trial court imposed 15 years to life for the attempted murder and a 10-year gang enhancement, for a total of 25 years to life in that count. The trial court stayed midterm sentences in counts 2 and 6 under section 654.

Appellant appeals on the grounds that: (1) the trial court erred in excluding a surreptitiously recorded conversation in which an alleged accomplice stated he was the shooter; (2) the trial court erred in instructing the jury with a kill zone instruction in the attempted murder counts; (3) appellant's conviction for the attempted murder in count 1 violates his federal constitutional right to due process; (4) the trial court failed to instruct the jury in count 5 with a simple attempted murder instruction and read a hodgepodge instruction instead; (5) appellant's convictions for assault with a semiautomatic firearm in counts 2 through 4 and 6 violate his federal constitutional right to due process, since there was no evidence he used a semiautomatic weapon to commit the charged offenses; (6) the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of

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1 All further references to statutes are to the Penal Code unless otherwise indicated.

assault with a firearm in counts 2 through 4 and 6; (7) appellant's convictions for assault with a semiautomatic weapon in counts 3 and 4 violate his federal constitutional right to due process, since there is insufficient evidence appellant willfully committed an act that was likely to result in injury to the victims; (8) appellant's conviction for assault with a semiautomatic weapon in count 2 violates his federal constitutional right to due process, since there is insufficient evidence that he willfully committed an act likely to result in the victim's injury; (9) the true findings and the enhancements based on the gang allegations in counts 3 and 4 violate appellant's constitutional right to due process because there is insufficient evidence of the elements of section 186.22, subdivision (b)(1)(C); and (10) the trial court made several sentencing errors.

FACTS

At approximately 2:30 p.m. on December 11, 2006, Trevell Thompson (Thompson) and Bryant Jackson (Jackson) were outside the front gate of Thompson's apartment building in Pasadena. They were preparing to enter the gate and were accompanied by Thompson's brother Kijuana, who was six years old, and Thompson's sister Jacari, who was 10 years old. Thompson's apartment building was known as a hangout for Squiggly Lane gang members. Jackson recalled Jacari's being in front of him and Thompson. She was at a distance of about five feet and toward the sidewalk. Kijuana was in approximately the same area as the others. Thompson was running to try to get Kijuana in the gate because Kijuana was going toward the sidewalk. Before anyone could enter the gate, a car pulled up in front of the gate and shots rang out. Thompson was shot in the leg. Kijuana and Jacari ran into the gate. Jackson had noticed the car, a silver Lexus, stopped at the stop sign at the corner. A neighbor heard two gunshots.

When Officer Jason Clawson (Clawson) responded to a "shots fired" call and began to enter the gate of Thompson's apartment building, he saw Franklin Thompson (Franklin) running toward him. Franklin entered apartment No. 9 and shut the door. Jackson came out of the same apartment. Jackson told Clawson he knew nothing about a shooting. A car pulled up and three females got out and hurried to apartment No. 9.

After being let into apartment No. 9, Clawson found Thompson inside with a through-and-through gunshot wound to his leg. Thompson said he did not know who shot him. Although Franklin did not want Clawson to call paramedics, Clawson did so, and Thompson was taken to the hospital.

At appellant's trial, Jackson denied telling Detective Keith Gomez (Gomez) after the preliminary hearing that he recognized the car that pulled up as belonging to Amir Faquir (Faquir). He denied saying that Faquir was driving, and that he saw appellant stick his head out the window and start shooting. Jackson later admitted he might have said it was appellant, but only because he disliked appellant. Jackson denied telling Gomez that appellant and Faquir were members of the Projeck Gangsters gang. At trial, Jackson first denied and then admitted that he saw three people in the car.

Jackson claimed he was no longer in a gang but was a former member of the Squigglys gang. Jackson had a fistfight with appellant about a year before he was shot. On the day before he was to testify at appellant's preliminary hearing, he was shot twice—in the back and in the neck. Jackson denied telling the prosecutor that the day he was shot, the shooters told him, "Snitches get shot." Jackson admitted it was "hard" to testify in court. Jackson had known Faquir for about seven years. Jackson acknowledged that the Squigglys and the Projeck Gangsters are enemies and had been for a long time. Jackson said that a woman he called "Auntie" who was in court was appellant's aunt. He acknowledged that he got a ride with appellant's mother the last time he came to court.

Thompson said that when he was shot his brother and sister were "kind of far down" and were about 20 or 30 feet away. He did not pay attention to the shooter's car and did not know who owned it. He had known appellant since they were little. The only reason he did not want to go to the hospital was because he was on probation, and being with Jackson was a violation. At the hospital he spoke to Gomez. He acknowledged telling Gomez, "'I know who shot me but I can't tell you.'" He admitted his membership in the Squigglys gang and said that being a snitch can put your life in danger.

Thompson testified at trial that when he testified at appellant's preliminary hearing, he did not identify appellant as the shooter. He did not remember speaking with Gomez after the hearing. Later in his trial testimony, he acknowledged telling Gomez after the preliminary hearing that "'it was too many people and I was—I don't know, I was nervous about what everybody was going to think if I just sat up there and just pointed him out like that.'" Thompson also acknowledged that he did not want to testify at the preliminary hearing because it was putting his life in danger and that "by me just sitting up here" he was doing so.

The prosecutor played for the jury audio recordings of Gomez speaking with Thompson and speaking with Jackson at the police station. He also played the interview with Thompson at the preliminary hearing.

Thompson testified that he had "heard that some people did hear that tape," and they were "probably" Projeck Gangsters. Thompson denied that people telephoned him and told him they heard his voice on a tape recording. His father heard about Thompson's talking on tape. Thompson acknowledged he was in custody because he said he would not come to court to testify against appellant. He acknowledged that he selected appellant's photograph as that of the shooter from a photographic lineup that Gomez showed him. He did so because Gomez threatened him with jail. When Gomez asked him what that person's name was, Thompson answered "Jarmon" and said Jarmon's last name was "Sanford." Thompson acknowledged saying that Jackson could have been the target of the shooting because Jackson won a fight he had with appellant. In cross-examination, Thompson said he never said that he saw who shot him, and he told Gomez only what Gomez wanted to hear.

Sean Baptist (Baptist) was Thompson's friend, but Thompson denied Baptist was a Squiggly. Baptist was in his car with Thompson and Jackson when Baptist was shot and killed. On that occasion, a bullet went through Thompson's sweatshirt. He denied telling Detective Broghamer that the car that came at them belonged to appellant's brother, Jerrell Sanford (Jerrell). Thompson was angry at himself for talking to Gomez and Detective Broghamer because that was not something he was raised to do. He had

been gang-banging "since forever" and it was not something he thought he would ever do, but he allowed himself to crack.

Deputy Edmund Anderson (Anderson) of the Los Angeles County Sheriff's Department testified as a firearms identification expert. He explained the difference in the firing mechanisms of a revolver and a semiautomatic pistol. He testified that it was possible to determine from what type of gun any casings were fired. Anderson stated that a .38 special cartridge, which is long and has a rim, is designed to be fired from a revolver. A .380-autocaliber cartridge casing is designed to be fired from a semiautomatic pistol. Anderson did not examine any .380-autocaliber cartridge casings from this case.

There was no gun recovered in the instant case. Upon arriving at the shooting scene, Gomez was directed to two shell casings that were lying in the street close to the sidewalk in front of the apartment complex.

Gomez testified as a gang expert. He knew Jackson, Thompson, and Jerrell. The Squiggly Lane gangsters defected from the Pasadena Denver Lane gang in the early 1990's. One of the founders of the Squiggly Lane gang was Thompson's father, Franklin, also known as "Hard Rock." Franklin is still a leader of the gang. The gang has approximately 80 members and uses the color red because it is a Blood gang. Gomez testified about the gang's typical articles of clothing and tattoos, as well as the crimes that make up one of their primary activities.

The Projeck Gangsters began in the early to mid-90's in Pasadena. They adopted the color black. Gomez described their articles of clothing, tattoos, and symbols. They are strong allies with the Pasadena Denver Lane gang, a Blood gang. This is why Projeck gang members sometimes supplement their black clothing with red items. In prison, a Projeck gang member would claim to be from the Denver Lane Bloods because Denver Lane is bigger and more powerful, and they are close allies anyway. The Projeck Gangsters gang and the Squiggly Lane gang are carrying on a very violent feud of several years' standing, and there have been a number of murders and shootings related to the feud.

Gomez was of the opinion that appellant is a member of the Projeck Gangsters gang and that his moniker is "Mon Deuce." He based this opinion on appellant's being stopped several times while in the company of admitted and known gang members and being stopped at known gang locations. While in custody, appellant was involved in an assault on a Crip gang member and made remarks that only a Blood gang member would commonly say. He also admitted to being a member of the Denver Lane gang. Certain MySpace pages of known Projeck Gangsters refer to appellant. There were messages saying "Free Jarmon and Jerrell" on a gang member's MySpace page.

Gomez testified that Faquir is a Projeck Gangster with the moniker "Little Dollar." Gomez told the jury about predicate crimes committed by Marcus Louis Momon (Momon), who was convicted of carjacking in May 2006, and Maurice Lamar Thompson (Maurice), who was convicted of attempted murder in March 2004. Momon is a member of Pasadena Denver Lane Bloods, and Maurice is a Projeck Gangster.

Gomez acknowledged testifying at appellant's preliminary hearing that he asked Jackson if appellant shot him, and Jackson nodded his head up and down but did not give a verbal response. Approximately one year later, Gomez wrote a report about this conversation, which had taken place at the time of the preliminary hearing. The report stated that Jackson said he noticed a white Lexus and knew it belonged to a male named Faquir. As the vehicle pulled alongside him and Thompson, Jackson saw appellant stick his head out the front passenger window of the vehicle. Upon questioning by appellant's defense attorney at trial, Gomez said he did not reveal these verbal details during the preliminary hearing because the defense attorney objected after the first question regarding the interview. Gomez had no opportunity to continue describing the interview with Jackson.

Detective Kevin Okamoto (Okamoto) also testified as a gang expert, in addition to giving background on the instant case. When given a hypothetical based on the facts of the instant case, Okamoto was of the opinion that the shooting of Thompson was done for the benefit of the gang. The shooting of a rival gang member instills fear and shows the rival gang the degree of violence in which another gang is willing to engage. Such a

shooting also instills fear in the community with the result that members of the community are afraid to cooperate with law enforcement. Gomez was of the same opinion.

Okamoto testified about a Projeck Gangster named Paymi Pitts (Pitts). On December 27, 2006, a search was conducted at Pitts's residence where gang photographs and graffiti were found. The search also yielded a box of .380-caliber ammunition. The casings found at the Thompson shooting scene were .380 shells, and the manufacturer, caliber, and color of the casings in Pitts's home were identical to the casings that were found at the Thompson shooting scene.

Police had surreptitiously recorded telephone calls appellant made from custody. In one conversation appellant spoke with Pitts. Pitts asked appellant who snitched and appellant replied, "They won't say." Appellant stated that they have him for attempted murder and adds, "As long as you got that—that thing—I mean, that shit over there, that's bull. Keep that thing tucked." Pitts replies, "Yeah, they can't say you did it, as long as they don't find that gun." Gomez strongly felt that they were referring to the weapon that was used to shoot Thompson. At one point appellant made a call to Ronnie Ron or Rome and said, "'It looks like they're gonna break Amir's [Faquir's] ass.'" Gomez stated that this meant the police would get Faquir to confess and break the gang rules. When Faquir was arrested and placed in the police car with appellant he was crying and generally emotional. Rome told appellant, "Somebody said your name, homie. That's what I know. That's what I'm saying, homes. That's what—hope it wasn't Amir, but I think it was."

Defense Evidence

DeJane Cooper (Cooper) made telephone connections for appellant when he called from jail so that he could talk to third parties. When appellant asked her to take care of a certain matter, she and appellant's friend Ronnie Ron (Ron) went upstairs in the house where Cooper and appellant's family lived. They took some marijuana from Jerrell's

closet. One of the words appellant used for marijuana was "special."[2] Cooper flushed the marijuana down the toilet. They also took a gun game from appellant's room, and Ron took the game with him.

Charles Spann (Spann) testified that he attended Glendale Community College and played football with appellant before enrolling in the University of Arkansas. He was 99.9 percent certain that on Monday, December 11, 2006, appellant was training with him at the college, because none of Spann's regular training companions ever missed a Monday. To his knowledge, appellant attended class before training began that day. All the team members would be training from noon until 5:00 p.m.

LaWanda Sanford (LaWanda), appellant's mother, testified that appellant attended college on December 11, 2006. She or someone else always drove him to school. She remembered that she drove appellant on that day because they saw Pitts on the freeway en route to the college. LaWanda began calling appellant Mon Deuce in his ninth grade year. "Mon" stood for the end of appellant's name, and "Deuce" for the number 2 on the jersey he wore.[3] To her knowledge, appellant was not in a gang.

Rebuttal Evidence

Gomez testified that LaWanda never told him about appellant's whereabouts on December 11, 2006.

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[2] Gomez testified that he executed a second search warrant at appellant's house after listening to a telephone conversation in which appellant told Jerrell to move "'the special'" that the police had missed during the initial search. Gomez said that, based on his expertise, he believed appellant was referring to a .38-caliber revolver. Appellant gave the location of the special's hiding place—up in a bedroom closet—but police found only ammunition in that spot when they searched.

[3] Gomez testified that the word "deuce" in appellant's moniker stood for the second letter of the alphabet, "B," which in turn stood for "Blood."

DISCUSSION

I. Exclusion of Conversation Containing Faquir's Admission

A. Appellant's Argument

Appellant contends that the trial court prejudicially abused its discretion in refusing to admit a recorded telephone conversation between Faquir and two girls. This ruling resulted in the exclusion of probative evidence that Faquir, and not appellant, was the shooter.

B. Proceedings Below

At various times throughout the trial, the court and the parties addressed the defense motion to introduce evidence of third party culpability. Counsel wished to introduce a surreptitiously recorded telephone conversation between Faquir and two girls—Kayla Hunter (Kayla) and Jazzmyne Holden (Jazzmyne). In the conversation, Faquir appears to admit he was the shooter. The basis for introduction of the conversation was that it was a declaration against interest by Faquir. The trial court declared Faquir "unavailable" when he refused to testify.

The trial court cautioned defense counsel that, if he wanted to put Faquir's statements against penal interest in evidence, other statements by Faquir to Gomez in a surreptitiously recorded interview would be admissible as well. In that statement, Faquir said that appellant was the shooter. Counsel replied that, even with that condition, he wanted to introduce the conversation between Faquir and the girls.

After reviewing the transcript of the telephone conversation, the trial court overruled the prosecutor's objection to some of the lines in the transcript, indicating that these lines would qualify as statements against penal interest. Before argument on the motion, the trial court stated it was concerned about the trustworthiness of the statements. After hearing argument, the trial court noted that part of Faquir's statements consisted of a self-defense claim, or a revenge claim, or a claim of a long-standing shooting relationship with one of the victims. The trial court found these statements subject to interpretation as opposed to Faquir's statement to Gomez in which Faquir definitely said appellant was the shooter. One could not discern the true motive for either statement.

They were inconsistent with one another, and the statements in the telephone conversation were equivocal and subject to interpretation. Ultimately, the trial court determined that the statements in the recorded conversation lacked trustworthiness. The trial court decided it would not admit them for that reason, unless there was a stipulation that both sets of statements could be considered by the jury. The trial court stated that such a stipulation would, however, be inappropriate.

When defense counsel asked for clarification, the trial court replied, "The court has sustained the objection by the People with respect to introducing the statements as declarations against penal interest. The reason for that is the court finds that they're lacking in trustworthiness and because, if the court were to allow these declarations against penal interest, the court would necessarily be required to permit the other statements given to those detectives, and the court finds that the other statements given to those detectives so overwhelmingly incriminate your client that it would far do more prejudice to your client than the slight value that he would get by having these declarations against penal interest and I think would borderline ineffective assistance to counsel if you were to do that. That's the court's concern."

Later, during defense counsel's recross-examination of Gomez, defense counsel asked Gomez if he set up a pretext call to Faquir, and Gomez replied that he did. Counsel then asked, "And you overheard him confess to a shooting of Trevell Thompson, and you testified to that in court; isn't that correct?" The prosecutor objected and moved to strike. At sidebar, the prosecutor stated that the question had been unethical and contemptuous of the court's order. The trial court sustained the objection and admonished the jury.

One of the grounds for the defense's new trial motion was the trial court's refusal to admit Faquir's statements from the recorded conversation. The trial court denied the motion.

C. The Recording

Portions of the recording that the court found admissible, and which are singled out by appellant as exemplary, are as follows:

"K. . . . You just made it noticeable that it was you, Amir.

"A. Man, look. I'm going to tell you like this, Kayla. It – it – it – it's shit – it's shit that comes with gangbanging though.

"K. Okay. But the shit that comes with gangbanging don't mean stupid shit.

"A. But listen. I know, I understand that too, you know what I'm saying? But you got to listen. You got to listen to this though, Kayla. This nigga' Hammie (phonetic) really threatened my whole—my whole life, really like . . . when I'd seen, he trip on me. I had to burn him, Kayla. You feel me?"

". . . .

"A. Them niggas tripped on me, nigga'. Put out the burner, all that shit on me, nigga'. (Inaudible) on me. Then I lit their ass up, they was—Kayla, it was no—it was no—it was no choi— there was no other choice. You feel me? . . . The only thing I could do was—(inaudible) seen the homey, it was just like perfect timing. I seen the homey. I had mine; he had his. They're hanging out, boom, boom, boom, let's do it."

". . . .

"K. What? So wait. Who – if he sayin' he know who the shooter was, didn't – you shot Tyrell, right?

"A. Man, don't—Kayla? He just sayin' (inaudible) nigga' (inaudible) don't even know about me, nigga'. So I'm going to let him think whoever—you know what I'm sayin'?"

D. Relevant Authority

"'Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest. The proponent of such evidence must show "that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character."' [Citation.] 'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into

account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] '[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. . . . [¶] . . . We have recognized that, in this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'"' [Citation.] Finally, such statements, even if admissible are nonetheless subject to Evidence Code section 352 under which 'the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584-585, overruled on another ground in *Melendez-Diaz* (2009) 557 U.S. ___, ___ [129 S.Ct. 2527, 2532].)

"In order for a statement to qualify as a declaration against penal interest the statement must be genuinely and specifically inculpatory of the declarant; this provides the 'particularized guarantee of trustworthiness' or 'indicia of reliability' that permits its admission in evidence without the constitutional requirement of cross-examination." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 329.) "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. [Citation.]" (*People v. Frierson* 1991) 53 Cal.3d 730, 745; *People v. Greenberger, supra,* 58 Cal.App.4th at p. 334.)

E. Evidence Properly Excluded

We believe the trial court did not abuse its discretion in excluding the portions of the transcript that it found tentatively admissible as declarations against penal interest by Faquir. We can assume appellant chose the strongest statements by Faquir implicating himself as the shooter for inclusion in his opening brief, and these statements are, as the trial court stated, equivocal and subject to interpretation. With all due respect to the trial court, we believe it was overly generous in overruling the prosecutor's objection to the

lines in the transcript that are detailed in the record as admissible. For example, the trial court stated that the prosecutor's objection to page 8, lines 12 through 17, was overruled. Those lines read as follows: "K. Get it painted? What is that going to change, Amir? A. Nothin.' I'm talking about getting a whole new car though. K. Oh, okay. That sounds more like it. J. What did he say? K. He's going to get another car. J. Hmm-mm. K. Well don't do nothing stupid out your car again and call yourself by getting revenge for what happened to Gator (phonetic)."[4] Although these statements were ostensibly against Faquir's penal interest, in that they indicate his car was used, these statements by no means indicate that Faquir was the shooter, and other evidence would attach guilt to appellant as a principal in the crime in any event.

Again, on page 10, lines 25 through 27, the dialogue is as follows: "K. Yep, 'cause he's Lodalla (phonetic). But everybody already knew the business about (inaudible). A. But anyways, Kayla— K. Hmm-mm. A. — so he was coming at me with that, and then so it was like, um, uh, they, um—they, um—what was I about to say? The nigga' (inaudible) we was just like what's the story." These statements do not appear to be against Faquir's penal interest, to the extent the words mean anything at all.

In the portions selected for appellant's opening brief, it is only Kayla, not Faquir the unavailable witness, who implicated Faquir as the shooter by asking the question, ". . . you shot Tyrell, right?" Faquir's answer was far from affirmative and only dubiously qualifies as even an adoptive admission, i.e., "He just sayin . . . don't even know about me, nigga'. So I'm going to let him think whoever—you know what I'm sayin'?" Faquir's response is equivocal, and it indicates that it is mere indifference that prevents him from claiming to be innocent.

Faquir's statement that "I had mine, he had his" also strongly indicates that his statements in this conversation are untrustworthy, since neither Jackson nor Thompson was armed when Thompson was shot. It is possible Faquir was referring to himself and a

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4 We include two more lines than the six lines the trial court apparently allowed, since the line numbering in the transcript is not clear.

companion, but this ambiguity further adds to the untrustworthiness of these statements. Faquir talks about burning someone named Hammie, but there is no one by that name in this case, and therefore Faquir may not even be referring to the instant shooting.

By far the clearest statement against Faquir's penal interest was his admission that the shooting was carried out from his car at the insistence of a passenger. Kayla and Jazzmyne chide Faquir for using his own car and imply that it was "stupid shit" to do that. Faquir says, "I can't say no because this is one of my rider niggas that's riding for me any time, nigga'. I'm glad when they—when I—when I first started doing this, nigga", he don't (inaudible) like nigga' okay, this is how we gonna' do it—we gonna' do it this way. Okay. You know what I'm sayin'? " Kayla responds, "Yeah," and Faquir continues, "No words, nothin'. I couldn't deny him. You know what I'm sayin'? Even if there was out of my legs, now all I—now all that's for like me—me, what I got to do is get my hustle strong. You feel me? To go get my shit painted, go get it—you know what I'm sayin'? Come correct." These statements do no more than implicate Faquir as one of the occupants of his car, from which the shots reportedly were fired. This information has no exculpatory value for appellant. Finally, most of the transcript, from pages 9 to the end, appears to be an attempt by Faquir to explain to Kayla his longtime relationship with Jackson.

"'A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. The rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability."'" (*People v. Panah* (2005) 35 Cal.4th 395, 481.) "In order to exclude untrustworthy statements, . . . '[t]he statement must be so far contrary to the declarant's interests "that a reasonable man in his position would not have made the statement unless he believed it to be true." [Citations.]' [Citation.]" (*People v. Fuentes* (1998) 61 Cal.App.4th 956, 961.) This conversation's combination of disjointed phrases and vague and equivocal language was properly excluded by the trial court.

In addition, the conversation consists of many references and events outside the scope of the instant case and reasonably would have been inadmissible under Evidence

Code section 352. "Although the trial court did not expressly base its ruling on Evidence Code section 352, we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." (*People v. Geier*, *supra*, 41 Cal.4th at p. 582, citing *People v. Zapien* (1993) 4 Cal.4th 929, 976.) Faquir's statements possessed minimal probative value, and there was a strong probability that their admission would have "necessitate[d] undue consumption of time or . . . confus[ed] the issues, or misle[d] the jury." (Evid. Code, § 352.) Therefore, on this ground as well, the exclusion was not error.

Moreover, exclusion of the evidence did not abridge appellant's right to present a complete defense. "The general rule remains that '"the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 155.) Having concluded that the trial court did not abuse its discretion under the ordinary rules of evidence, we also conclude there was no federal constitutional violation. Untrustworthy hearsay evidence is not capable of raising a reasonable doubt. Thus, there was no constitutional violation.

Finally, given that jury deliberations began eight days after the defense gave its opening statement, and considering the strength of the evidence against appellant on all charged counts, we conclude that defense counsel's mention of the recording in his opening statement did not prejudice appellant. Even if the jury recalled defense counsel's opening remarks, there is no reason to assume the jury based its guilty verdicts on the defense's failure to produce the evidence, which would have been contrary to the jury instructions they received.

II. Kill Zone Instruction and Attempted Murder Charges

A. Appellant's Argument

Appellant contends that use of the kill zone instruction in the trial court's modified version of CALCRIM No. 600 was prejudicial error because that theory was inapplicable

to this case.[5] Only two shots were fired, one of which hit Thompson. There is no evidence of the origin of the second bullet, its trajectory, or where it landed. Appellant argues that both counts of attempted murder must be reversed.

B. Proceedings Below

Defense counsel did not argue against the reading of the kill zone portion of CALCRIM No. 600 and agreed with the language suggested by the trial court.

C. Relevant Authority

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

A "defendant may be convicted of the attempted murders of any within the kill zone, although on a concurrent, not transferred, intent theory." (*People v. Bland* (2002) 28 Cal.4th 313, 331 (*Bland*).) "The conclusion that transferred intent does not apply to

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[5] The instruction read by the trial court with respect to counts 1 and 5 was as follows: "The defendant is charged in counts 1 and 5 with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that: 1. The defendant took at least one direct but ineffective step toward killing another person; and 2. The defendant intended to kill that person. A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of a crime after preparations are made. It is an immediate step that puts the plan in motion, so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. A person may intend to kill a specific victim or victims and, at the same time, intend to kill anyone in a particular zone of harm, or kill zone. In order to convict the defendant of the attempted murder of Trevell Thompson, the People must prove that the defendant not only intended to kill Bryant Jackson but also either intended to kill Trevell Thompson or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Trevell Thompson or intended to kill Bryant Jackson by harming anyone in the kill zone, you must find the defendant not guilty of the attempted murder of Trevell Thompson."

attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Id*. at p. 329.) Concurrent intent exists "'when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*Id*. at pp. 329-330.)

D. Kill Zone Instruction Proper

Assuming, but not deciding, that the issue was preserved for appeal, we conclude that the trial court properly instructed the jury with the kill zone instruction. Two bullets were fired from a semiautomatic weapon at two adults and two children. Two bullets were more than enough to kill the two men, and this is evidenced by the fact that the apparent intended victim was not the one who was shot.

Contrary to appellant's belief that the fact that only two shots were fired means that a kill zone could not have been created, case law is to the contrary. Although there was no "kill zone" theory employed by the prosecution in *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*), our Supreme Court in that case recognized that where there is evidence that two victims are seated in a vehicle, "one behind the other, with each directly in [the defendant's] line of fire, [such supports] an inference that [the defendant]

acted with intent to kill both. [Citations.]" (*Id*. at p. 743.) "[T]he very act of firing a weapon '"in a manner that could have inflicted a mortal wound had the bullet been on target"' is sufficient to support an inference of intent to kill." (*Id*. at p. 742, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 (*Chinchilla*).) *Smith* concluded there was evidentiary support for finding two separate or concurrent intents to kill for two attempted murders due to the closeness of the victims in that case. In *Chinchilla*, as well, the court affirmed two convictions of attempted murder based on the firing of a single bullet at two police officers who were crouched, one behind the other, in the shooter's line of fire. (*Chinchilla*, *supra*, at p. 691.) In that case, the intent to kill the two different victims could be inferred from evidence that the defendant fired a single shot toward both victims, and both victims were visible to the defendant. (*Id*. at p. 685.)

In the daytime shooting in this case, both victims were clearly visible. It would have been reasonable for the jury to infer that, even if appellant's primary target was Jackson, his secondary target was Thompson, who was within the zone of risk. The close proximity of the victims to each other when shots were fired from the car provided the jury with sufficient facts to define the narrow kill zone in this case. Although the victims did not testify to seeing appellant shooting at them (contrary to their prior statements), they did acknowledge that they heard two shots after the car, later identified as Faquir's car, pulled up to them, implying that the shots were fired from the car and not from across the street or inside the house. "[A] primary intent to kill a specific target does not rule out a concurrent intent to kill others.' [Citations.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243.) Thus, the kill zone instruction was properly read to the jury.

III. Sufficiency of Evidence That Thompson Was Within the Kill Zone and a Target of the Shooting

A. Appellant's Argument

Appellant argues that there was insufficient evidence that Thompson was within a kill zone so as to justify use of the concurrent intent theory. According to appellant, the State's own evidence demonstrated that Thompson's wounding was an *inadvertent* consequence of the attempt to kill Jackson. This evidence consisted of Gomez's

testimony that appellant apologized to Thompson by telephone for shooting him when he intended to shoot Jackson. In addition, the prosecutor argued that, "If you create a kill zone, which is the zone you are aiming at where you don't care who is there, you are going to get the guy you are shooting at, then you are responsible, if you intend to kill the person you intend to kill, and *you don't intend to but shoot somebody who is in the same zone, in this case,* Betran [Jackson] is the target." (Italics added.) Therefore, appellant's conviction for the attempted murder of Thompson should be reversed.

B. Relevant Authority

"On appeal, we uphold the jury's verdict if there was substantial evidence to support it. [Citation.] Considering the entire record, we determine whether there is evidence that is '"reasonable in nature, credible, and of solid value"' from which a '"reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt."' [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 187.)

C. Evidence Sufficient

The prosecutor may have been momentarily inarticulate in explaining the kill zone, but this fleeting instance of incorrectly describing the theory does not warrant reversal. The rest of the prosecutor's argument in this case is in accord with the kill zone theory discussed in *Bland, supra,* 28 Cal.4th 313, and CALCRIM No. 600. The trial court here properly instructed the jury by means of CALCRIM No. 600 of the findings necessary for the kill zone theory. The trial court also told the jury that "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CALCRIM No. 200.) Absent any indication to the contrary, we presume the jury followed this instruction. (*People v. Jablonski* (2006) 37 Cal.4th 774, 806-807.)

The instant case is distinguishable from *People v. Anzalone* (2006) 141 Cal.App.4th 380 (*Anzalone*), in which the court held, "an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them. The prosecutor's argument incorrectly suggests that a defendant may be found

guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger. In fact, to be found guilty of attempted murder, the defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person. [¶] The prosecutor's argument concerning zone of danger was erroneous and misleading." (*Id*. at pp. 392-393.) In *Anzalone*, the prosecutor had argued that four attempted murder counts could be based on the shooter's firing two gunshots indiscriminately into a crowd, which meant that everyone in the zone of danger qualified as an attempted murder victim. (*Id*. at p. 391.) The court found that the error in the prosecutor's argument was prejudicial because the jurors were not instructed with CALJIC No. 8.66.1, which would have informed them of the proper application of a "kill zone" theory. (*Anzalone*, *supra*, at pp. 392, 395.) As we have stated, the jury here was properly instructed on application of the kill zone theory.

The single item of evidence—appellant's apology—that appellant so values as indicative of an inconsistent theory was probative only of appellant's effort to ingratiate himself with Thompson for an unknown reason. Appellant's apology to Thompson was also more probative of appellant's guilt in the shooting rather than of the inadvertence of Thompson's being shot or the lack of intent to kill Thompson or anyone else who was with Jackson. In any event, the jury heard the evidence of the apology and read the instructions. CALCRIM No. 600 informed the jury members that they must find appellant not guilty of the attempted murder of Thompson if they did not believe him to be in a kill zone. The jury was free to decide otherwise, but it found appellant guilty of the attempted murder of Thompson under these circumstances, and substantial evidence supports the verdict.

IV. Lack of Simple Attempted Murder Instruction in Count 5

A. Appellant's Argument

Appellant states that the prosecution proceeded on different theories for the attempted murders of Thompson and Jackson, i.e., that Jackson was the intended victim

and that Thompson was a kill zone victim. Appellant complains that, instead of providing the jury with separate instructions for each of the counts of attempted murder, the trial court gave an incomprehensible hodgepodge instruction.

B. Proceedings Below

The trial court discussed with counsel the attempted murder instruction, stating, "Attempted murder requires the specific intent to kill the target, and transferred intent doctrine does not apply. However, as you can see, in the instruction, CALCRIM No. 600, part—there is another doctrine called concurrent intent, where if a person is in a kill zone, and a person intends to, say, kill Bryant Jackson, he may also intend to kill Thompson." The trial court found the last line of the instruction confusing and asked the parties if they wished to change it. Both the prosecutor and defense counsel requested to keep the original language.

C. Relevant Authority

In reviewing an erroneous instruction claim, we must decide whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. (*People v. Frye*, *supra*, 18 Cal.4th at p. 957.) In conducting this inquiry, we must view the challenged instruction in the context of the overall charge, rather than judged in artificial isolation. (*Ibid*.; see also *People v. Smithey* (1999) 20 Cal.4th 936, 963.) In other words, the suitability of jury instructions is determined by the whole charge given to the jury, not individual instructions or parts of individual instructions. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

D. No Error

The instruction given by the trial court, CALCRIM No. 600, is quoted *ante*. All portions of this instruction are contained in the standard instruction recommended by the Judicial Council for attempted murder. It is not a "hodgepodge" invented by the trial court in this case. Appellant nevertheless contends the jury was forced to intuit that it should not consider the kill zone portion of the instruction with respect to Jackson in count 5. And, given that Thompson and not Jackson was shot, it is quite possible that the jury applied a kill zone theory to Jackson, which is contrary to the State's theory of the

case. Appellant speculates that the jury might have convicted appellant of the attempted murder of Jackson under a kill zone theory, and reiterates that there is insufficient evidence to support a conviction under this theory.

We do not believe the jury was necessarily confused as to the findings it needed to make in order to find appellant guilty of the attempted murder of Jackson. The instruction clearly applies the kill zone theory to the attempted murder of Thompson. Appellant's argument is without merit.

V. Evidence of Use of Semiautomatic Firearm

A. Appellant's Argument

Appellant contends there was no evidence that a semiautomatic firearm was used to commit the assaults in counts 2 through 4 and 6. Therefore, there is insufficient evidence of an essential element of the charged offenses.

B. Relevant Authority

The test for sufficiency of the evidence claims is set forth in section III of this opinion.

C. Evidence Sufficient

The jury received sufficient evidence to find that appellant used a semiautomatic firearm during the shooting. The firearms expert explained to the jury the difference between a semiautomatic firearm and a revolver and the fact that .380-caliber cartridge cases are fired from a semiautomatic pistol. Later, Gomez testified that he was directed to two shell casings that were lying in the street close to the sidewalk in front of the apartment complex when he arrived at the shooting scene. Gomez also testified that police found a box of .380-caliber ammunition when executing a search warrant at the home of Pitts, and this ammunition was from the same manufacturer and was of the same caliber and color of the casings found at the crime scene.

Furthermore, defense counsel asked Gomez during cross-examination, "The shell casings that you found at the—Mr. Thompson 's shooting were . . . .380 shells, correct?" Gomez replied, "Correct." Counsel also elicited confirmation that the shells at the crime scene matched the ones found at Pitts's house. He also elicited that some .380 bullets

found at Faquir's house "could go into the gun that was ultimately used to shoot [Thompson]." Gomez confirmed that any .380-caliber ammunition would work in a .380 semiautomatic gun.

Given Gomez's testimony in conjunction with that of the expert, we conclude there was sufficient evidence for the jury to find that the shooting was committed by means of a semiautomatic firearm. The jury clearly heard nothing that would contradict such a finding. Reversal is "unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The evidence was sufficient to support the verdicts in counts 2, 3, 4, and 6.

VI. Failure to Instruct Sua Sponte on Assault With a Firearm in Counts 2 Through 4 and 6

A. Appellant's Argument

Appellant contends that the trial court erred in failing to instruct the jury on assault with a firearm as a lesser included offense of assault with a semiautomatic firearm. Appellant maintains there was no evidence that the weapon used was a semiautomatic firearm, but there was substantial evidence that a firearm was used. This mandated that the lesser included offense instruction be given. Appellant asserts that, had the jury been given the option of convicting appellant of assault with a firearm, it likely would have done so, and appellant would have received a lesser penalty.

B. Relevant Authority

"A defendant is entitled to instruction on lesser included offenses, without a request or even over objection, if the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.] A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater offense cannot be committed without committing the lesser. [Citation.]" (*People*

v. Miceli (2002) 104 Cal.App.4th 256, 272, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Section 245, subdivision (b) provides, "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." Subdivision (a)(2) provides, "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment."

C. No Error

We conclude there was no evidence that the gun used was anything other than a semiautomatic firearm. Appellant certainly offered no such evidence and, indeed, helped to confirm that a semiautomatic weapon was used in the shooting. There is no duty to instruct on the lesser included offense when """there is no evidence that the offense was less than that charged."""" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) "'[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction' [citation]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 696), and the mere speculation that the crime was less than that charged is insufficient to trigger the duty to instruct (see *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1). In this case, it would have been unreasonable for the jury to find that appellant assaulted the victims with a firearm, but not a semiautomatic firearm. Given the lack of sufficient evidence that the crime was less than that charged, there was no error.

VII. Sufficiency of the Evidence in Counts 3 and 4

A. Appellant's Argument

Appellant contends there was insufficient evidence he intended to assault the children present at the scene, as charged in counts 3 and 4, because there is no evidence that appellant committed an act that would "probably" and "directly" cause injury to Kijuana or Jacari. (CALCRIM No. 875.) Moreover, appellant argues, during closing

argument, the prosecutor conceded that the State did not contend that appellant intended to shoot them. Therefore, there is insufficient evidence to establish the offenses.

B. Proceedings Below

In addressing the counts involving the children, the prosecutor stated in closing argument: "We read in the paper about a gang shooting all the time. Sometimes it's kids that are the victims. No one is ever saying that [a] gang member intended to shoot that kid that was the target—I want to get myself a three-year-old or a five-year-old or a six-year-old, and it's not the position here either." Later the prosecutor argued that "From the direction that the car was shooting at [Jackson], the two kids are in the way." According to appellant, the prosecutor quickly abandoned this theory and argued, "Now is the defendant intending to kill those children? Arguably, yes. Arguably, when you point a gun in the area or zone that you know is going to encompass other individuals, you are placing their li[ves] at risk. You don't have to reach that issue when it comes to the two kids." Appellant argues that the prosecutor then correctly pointed out that aggravated assault is a general intent crime, unlike attempted murder, but went on to say that "All you had to intend to do was pull your finger on that trigger, causing that bullet to leave. If you intended to do that act, pulling the finger to cause the trigger to eject a bullet, then you are guilty. . . . That's the difference."

C. Relevant Authority

Section 245, subdivision (b) provides that "[a]ny person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

"The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. (Cf. Pen. Code, § 7, subd. 1 ['"willfully," when applied to the

intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to'].) The evidence must only demonstrate that the defendant willfully or purposefully attempted a 'violent injury' or 'the least touching,' i.e., 'any wrongful act committed by means of physical force against the person of another.' [Citations.] In other words, '[t]he use of the described force is what counts, not the intent with which same is employed.' [Citation.] Because the offensive or dangerous character of the defendant's conduct, by virtue of its nature, contemplates such injury, a general criminal intent to commit the act suffices to establish the requisite mental state. [Citations.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 214-215.)

D. Evidence Sufficient

Appellant's contentions, based on the prosecutor's closing argument, ignore the fact that the jury was correctly instructed on the elements of assault with a semiautomatic firearm. The trial court instructed the jury with CALCRIM No. 875,[6] which complies with the definitions of assault set forth in *People v. Colantuono, supra,* 7 Cal.4th at pages

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6 The trial court read CALCRIM No. 875 in pertinent part as follows: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a semiautomatic firearm that, by its nature, would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and [¶] 4. When the defendant acted, he had the present ability to apply force with a semiautomatic firearm to a person. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone or gain any advantage. [¶] The terms 'application of force' and 'apply force' mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough, but touching does not have to cause pain or injury of any kind. [¶] The People are not required to prove the defendant actually touched someone. [¶] The People are not required to prove that the defendant actually intended to use force against someone when he acted. [¶] No one needs to actually have been injured by the defendant's acts or act, but if someone was injured, you may consider that fact along with all the other evidence in deciding whether the defendant committed an assault, and, if so, what kind of assault it was.

214-215, and *People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*). This instruction properly sets forth the mental state the jury was required to find in order to convict defendant under the evidence presented in this case. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557.)

Appellant also ignores the fact that, when the prosecutor's argument is placed in context, he did not misstate the law regarding the mens rea required for assault. The prosecutor argued that appellant intentionally pulled the trigger while the children were in an area where they could have been hit by the bullets appellant shot. There was sufficient evidence to support this theory. Jackson testified that when the car pulled up alongside the curb, Thompson's sister had just gone through the gate and Thompson was trying to get his little brother inside, but his brother was going toward the sidewalk. Jackson said the children were approximately five feet from him and Thompson. As the jury was instructed, "[t]he testimony of only one witness can prove any fact." (CALCRIM No. 301.)

Moreover, the trial court told the jury that evidence consists of the testimony of witnesses, the exhibits, and whatever the trial court has deemed to be evidence, and *nothing* that the attorneys say is evidence. (CALCRIM No. 222.) The jury was reminded that it was the final arbiter of the facts. (*Ibid*.) We must presume that the jury followed these instructions. (See, e.g., *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

As stated in *Williams*, *supra*, 26 Cal.4th at page 786, an assault is generally said to occur whenever the next movement would, at least to all appearances, constitute a battery. It is not necessary, however, that a defendant "must in every instance do everything physically possible to complete a battery short of actually causing physical injury." (*People v. Raviart* (2001) 93 Cal.App.4th 258, 266.) A defendant demonstrates the required present ability once he "'has attained the means and location to strike immediately.'" (*Id*. at p. 267.) "[A]n assault may be committed by '[h]olding up a fist in a menacing manner, drawing a sword, or bayonet, [or] presenting a gun at a person who is within its range . . . .'" (*Ibid*.) "Although temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to inflict

injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*People v. Chance* (2008) 44 Cal.4th 1164, 1171.) The testimony of the People's witnesses, if believed by the jury, was sufficient to establish the necessary mens rea and the remaining elements of assault by means of force likely to produce great bodily injury. On the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt of assault with a semiautomatic weapon on the two children.

VIII. Sufficiency of the Evidence in Count 2

A. Appellant's Argument

Appellant disputes his conviction of assault with a semiautomatic weapon on Thompson. According to appellant, the prosecution proceeded on a kill zone theory with respect to the shooting of Thompson and did not argue that appellant intended to murder or assault Thompson. The "kill zone" theory is inapplicable to this case, and, because the prosecutor did not articulate any other theory under which appellant is guilty of assaulting Thompson, the assault conviction in count 2 must be reversed.

B. Relevant Authority

We have set out the pertinent statutes and the standard for finding sufficient evidence in previous sections.

C. Evidence Sufficient

The evidence shows that appellant fired two bullets at Jackson and Thompson, who were in close proximity to one another. The jury was properly instructed regarding the elements it had to find before convicting appellant of the charged assault upon Thompson in count 2. The jury was also separately instructed on the kill zone theory of attempted murder for that crime, as charged in count 1. These crimes and instructions are not mutually exclusive under the facts of this case. As noted, assault is a general intent crime. Firing two bullets at two rival gang members who are standing together in front of a hangout for the rival gang was without doubt an act that would "probably and directly result in the application of physical force against another." (*Williams, supra,* 26 Cal.4th at p. 790.) Appellant's argument is without merit.

IX. Sufficiency of Evidence to Support Gang Allegation Findings in Counts 3 and 4

A. Appellant's Argument

Appellant points out that the prosecutor in closing argument expressly stated that putting young children at risk is out of bounds for gang members. Therefore, appellant argues, the prosecution's own argument indicates there could be no benefit to the gang in endangering Kijuana and Jacari, and such a violation of recognized gang rules would cause the Projeck Gangsters to suffer disrepute. As a result, there is insufficient evidence to support the true findings in counts 3 and 4.

B. Evidence Sufficient

Appellant quotes, but does not emphasize, that the prosecutor also argued that "The fact of the matter is, gang members do shoot and are willing to shoot whoever their target is . . . and they are willing to take that shot even if there are children in the area." The act of shooting at Jackson resulted in appellant's being charged with several crimes. The act of shooting was done for the benefit of the Projeck Gangsters. The intent to enhance the gang's reputation that instigated the shooting cannot be parsed out on the receiving end based on the nature of the victims. Because the victims were children cannot absolve the actor of the consequences of committing a shooting for the benefit of his gang. (See, e.g., *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1351, 1355 [gang allegation found true in murder of three-year-old]; *People v. Vang* (2001) 87 Cal.App.4th 554, 558 [gang allegation found true in murder of one child and attempted murder of four children in gang shooting].) Appellant's argument is without merit.

X. Sentencing Errors

A. Appellant's Argument

Appellant contends the trial court erred in sentencing him to indeterminate terms of 15 years to life for the attempted murders in counts 1 and 5 because the information did not allege that appellant acted with premeditation, and the jury did not find that he so acted. Instead, the trial court should have imposed a determinate term of five, seven, or nine years in count 1 and one-third the midterm of seven years in count 5 (two and one-third years).

Appellant also contends the trial court erred in imposing a 10-year gang enhancement in count 5 instead of an enhancement of three and one-third years (one-third of 10 years). The trial court also erred by imposing full 10-year gang enhancements in counts 3 and 4, which are subordinate terms. Instead, the trial court was required to impose enhancements of three and one-third years. Remand for sentencing is required.

Respondent concedes that, assuming there is no forfeiture, remand for resentencing is warranted.

B. Proceedings Below

The information charged appellant with committing attempted murder with malice aforethought. During the discussion of proposed jury instructions, the trial court noted for the record that the People filed an information that did not include the allegation that the attempted murders in counts 1 and 5 were premeditated and deliberate. After resting, however, the prosecutor had requested leave to amend the information to include that allegation. The record shows that the parties and the trial court appeared to be under the impression that the sentence for simple attempted murder was 15 years to life, and the sentence for premeditated and deliberate attempted murder was 25 years to life. After hearing argument, the trial court denied the prosecutor's request and determined it would not instruct the jury with CALCRIM No. 601.[7] The jury therefore made no finding as to premeditation. At the sentencing hearing, the prosecutor, who did not file a sentencing memorandum, argued that "it was willful, deliberate and premeditated as to each [attempted murder] count." The trial court sentenced appellant to 15 years to life on the attempted murder counts.

C. Relevant Authority

"The crime of attempted murder carries a determinate sentence of five, seven, or nine years. (§§ 187, 664, subd. (a).) However, if the jury finds the attempted murder was willful, deliberate, and premeditated, the defendant must be sentenced to life

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[7] CALCRIM No. 601 explains the criteria for determining the truth of an allegation that the attempted murder was done willfully and with deliberation and premeditation.

imprisonment with the possibility of parole. [Citations.] This substantial increase in potential penalty brings a section 664, subdivision (a) premeditation allegation under the *Apprendi*[8]rule. [Citations.]" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 134, disapproved on another point in *People v. Deloza* (1998) 18 Cal.4th 585, 600.)

D. Resentencing Required

In this case, the lack of a jury finding on premeditation, or, indeed, an allegation of premeditation, mandates that appellant be resentenced on the attempted murder counts. "[A]n unauthorized sentence must be vacated and a proper sentence imposed whenever such a mistake is discovered." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 395, fn. 7.) Because appellant's sentence will now consist of determinate terms (except for the firearm use enhancement), appellant is subject to the sentencing rules contained in section 1170.1.

With respect to the gang enhancements, section 1170.1 provides that "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." Therefore, appellant is correct when he alleges that the trial court erred in imposing the full enhancements on the subordinate terms. [9]

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8 *Apprendi v. New Jersey* (2000) 530 U.S. 466.

9 We note that there are errors in the abstract of judgment regarding the enhancements imposed in counts 1 and 5, but these will be corrected after resentencing. We also note that any enhancements not imposed under the various subdivisions of section 12022.53 must be stayed, as held in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.

DISPOSITION

The sentence is reversed with respect to counts 1 and 5 and to the gang enhancements on each count. The matter is remanded for resentencing with directions to the trial court to impose determinate sentences in counts 1 and 5 and one-third the term for any enhancements imposed in each subordinate count. In all other respects the judgment is affirmed. The superior court is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ